

PATENT

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Patent Application of: Eippert) Examiner: M. Henderson
)
Serial No.: 09/920,386) Art Unit: 3722
)
Filed: August 1, 2001)
)
For: Medication Reminder System) Atty Dkt: 27228/04002

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Alexandria, VA 22313-1450

SECOND AMENDED APPEAL BRIEF

Applicant hereby appeals the Final Rejection, dated January 12, 2005, of the above mentioned Application. A Notice of Appeal was mailed May 12, 2005, and received a filing date of May 16, 2005. Enclosed is a Second Amended Appeal Brief in response to a Notice of Non-Compliance. Applicant respectfully requests any additional extension which may be required, and is filing such extension fees as may be necessary.

The following items are included in this Amended Appeal Brief, beginning on the pages set forth below:

CERTIFICATE OF TRANSMISSION

I hereby certify that this document (along with any documents referred to as being attached or enclosed) is being transmitted electronically to the US Patent and Trademark Office on this 20th day of March, 2007.

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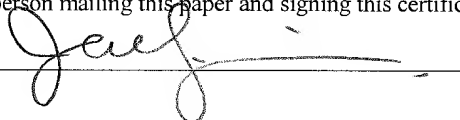


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(C) Real Party in Interest

The Applicant of the above mentioned Application is the inventor, Gregory Eippert, indicated in the caption of this Appeal Brief.

(D) Related Appeals and Interferences

None.

(E) Status of Claims

Claims 11 and 12 have been canceled.

Claims 1-10 and 13-19 are pending, on appeal, and have the following status:

Claims 1-5, 7-10 and 13-15 are finally rejected under 35 U.S.C. 103(a) as unpatentable over U.S. Patent No. 5,995,938 to Whaley (“Whaley”) in view of U.S. Patent No. 1,073,364 to Rush (“Rush”).

Claims 6, 16, 18 and 19 are finally are finally rejected under 35 U.S.C. 103(a) as unpatentable over Whaley in view of Rush and further in view of U.S. Patent No. 5,992,888 to North et al. (“North”).

Claim 17 is finally rejected under 35 U.S.C. 103(a) as unpatentable over Whaley in view of Rush and further in view of U.S. Patent No. 4,295,664 to Cutting (“Cutting”).

(F) Status of Amendments

There are no outstanding amendments. Claims 1-10 and 13-19 were finally rejected in a Final Office Action dated January 12, 2005.

(G) Summary of Claimed Subject Matter

Claims 1-10 and 13-19 of the present application recite a system or method for reminding patients or caregivers what medications to take or administer, and how and when to take or administer the medications.

The system and method make use of a disposable color coded sheet (Figs. 1 and 2, Ref. 20; and at least Page 3, beginning at Line 11) with one or more rows (Fig. 2, Ref. 28) which are completely color shaded (Page 3, beginning at Line 18). The rows intersect with columns (Fig. 2, Ref. 30) to form a matrix (Fig. 2, Ref. 34, and at least Page 3, Lines 12-13). The rows and columns include headers (Fig. 2, Ref. 38, at least Page 3, Lines 13-17), such as icons (Fig. 2, Ref. 32, at least Page 3, Lines 14-15) graphically representing the time of day, medical markings, such as medications, or designations of which eye to place medications within (Fig. 2, Ref. 26, at least Page 4, Lines 1-5 and 11-16). The sheet may also include advertising markings (Fig. 2, Ref. 42, beginning at Page 4, Line 5) corresponding to the medications indicated on the sheet or to the pharmacy. Color coded medication containers (Fig. 1, Ref. 80, at least Page 4, Lines 20-24 and Page 5, Lines 1-2 and 20-24) are also provided. The medication containers are color coded to correspond to the color of the completely color shaded row of the sheet indicating that medication (at least at Page 4, beginning at Line 20 to Page 5, Line 2). The color coding is provided by a colored container cap or by a colored sticker (Fig. 1, Ref. 82; Fig. 2, Ref. 40 and Page 4, Lines 20-23) applied to the container from the sheet. The use of a sheet having completely color shaded rows corresponding to color coded medication containers, together with graphic icons indicating time of day or which eye a medication is administered, provides better understanding by visually impaired and elderly patients to assist with medication compliance (at least Page 5, Line 20 to Page 6, Line 4).

Specific identification of the structures and functions recited in the specific claims are referenced with respect to the Figures and Specification, both above and as set forth below:

Claim 1: At least Figures 1-2; and at least Page 3 beginning at Line 11 through Page 5, Line 2.

Claim 2: At least Page 3, Lines 18-19 and Figs 1 and 2.

Claim 3: At least Page 4, Lines 1-5 and Figs 1 and 2.

Claim 4: At least Page 3, Lines 3-5; Page 4, Lines 4-5; Page 6, Lines 2-4 and Figs 1 and 2.

Claim 5: At least Page 4, Lines 4-5 and Figs 1 and 2.

Claim 6: At least Page 4, Lines 4-10; Page 5, Lines 16-20 and Figs 1 and 2.

Claim 7: At least Page 4, Lines 1-10 and Figs 1 and 2.

Claim 8: At least Page 4, Lines 1-4 and Fig. 2.

Claim 9: At least Page 4, Lines 1-16 and Figs. 1 and 2.

Claim 10: At least Page 3, Lines 1-23; Page 4, Lines 17-23; Page 5, Lines 1-7 and Figs. 1 and 2.

Claim 13: At least Page 4, Lines 17-23; Page 5, Lines 1-2 and Figs. 1 and 2. Claim

14: At least Page 3, Lines 11-23 and Page 4, Lines 1-16.

Claim 15: At least Page 3, Lines 11-23 and Page 4, Lines 1-16.

Claim 16: At least Page 4, Lines 5-10.

Claim 17: At least Page 3, Line 1 through Page 5, Line 2 and Figs. 1 and 2.

Claim 18: At least Page 4, Lines 5-10 and Fig. 2.

Claim 19: At least Page 4, Lines 5-10.

(H) Grounds of Rejection to be Reviewed on Appeal

A. Whether Claims 1-5, 7-10 and 13-15 are improperly rejected under 35 U.S.C. 103(a) as unpatentable over U.S. Patent No. 5,995,938 to Whaley in view of U.S. Patent No. 1,073,364 to Rush?

B. Whether Claims 4 and 5 are improperly rejected over U.S. Patent No. 5,102,169 to Mayfield in view of Whaley?

C. Whether Claims 6, 16, 18 and 19 are improperly rejected under 35 U.S.C. 103(a) as unpatentable over Whaley in view of Rush and further in view of U.S. Patent No. 5,992,888 to North et al.?

D. Whether Claim 17 is improperly rejected under 35 U.S.C. 103(a) as unpatentable over Whaley in view of Rush and further in view of U.S. Patent No. 4,295,664 to Cutting?

(I) Argument

A. Claims 1-5, 7-10 and 13-15 are improperly rejected under 35 U.S.C. 103(a) as unpatentable over Whaley view of Rush, and this rejection should be reversed.

The rejection of Claims 1-5, 7-10 and 13-15 as obvious over Whaley in view of Rush is believed improper, and should be reversed. Independent Claim 1 recites a medication reminder system having a color-coded sheet, where one or more rows are completely color shaded. The columns and rows intersect to form a matrix of fields. The rows and columns include headers defining parameters of the rows, columns and fields. The headers include medical markings. Finally, corresponding color coded medication containers are also provided.

To render an invention obvious, prior knowledge in the field of the invention must be supported by tangible teachings of reference materials. Gambro Lundia AB v. Baxter Healthcare Corp., 110 F.3d 1573, 1578-79 (Fed. Cir. 1997) ("However, the record must provide a teaching, suggestion, or reason to substitute computer-controlled valves for the system of hoses in the prior art. The absence of such a suggestion to combine is dispositive in an obviousness determination.") While Whaley provides a medical compliance system having a computer and printer for generating labels and a schedule for prescription medications, as the Final Office Action points out, Whaley fails to disclose sheets having completely color shaded rows shaded with different colors, as well as ophthalmology medications or eye placement designations.

The Final Office Action improperly proposes that Rush discloses a system which, when combined with Whaley, results in the recited invention. The Rush reference discloses a saloon stocking recording chart, which, even if it were relevant art in the field of invention, does not disclose the features recited in Claim 1. Rush discloses the use of colored rows AND colored columns. Rush provides saloon stock monthly totals in colored horizontal rows which correspond to the daily colored vertical column saloon stock records. Rush does not disclose the use of color coded rows corresponding to color coded medication containers. Even if Rush did provide such a teaching, there is no suggestion in Rush to combine the color coded rows and columns with the medication compliance system of Whaley to obtain the present invention. The combination of the Whaley reference with the improperly cited Rush reference, is in error and should be reversed.

B. Claims 4 and 5 are improperly rejected over U.S. Patent No. 5,102,169 to Mayfield in view of Whaley, and this rejection should be reversed.

The rejection of Claims 4 and 5 as failing to provide structural differences and limitations over the prior art combination of U.S. Patent No. 5,102,169 to Mayfield (“Mayfield”) as modified by Whaley, is also improper and should be reversed. Dependent Claim 4 recites the medication markings as being ophthalmology medications. Dependent Claim 5 further recites the medical markings as designating which eye to place the medication within. Although the Final Office Action indicates that the limitations of Claims 4 and 5 are not structural and do not provide structural limitations, structure is in fact provided. Indeed, the limitation provided by Claim 5 requires a specific column having a heading referencing an icon in the shape of an eye. While the limitation of Claim 4 requires a specific completely color shaded row having an ophthalmology medication.

While it is suggested in the Final Office Action that Claim 4 should be rejected since the Mayfield reference as modified by Whaley is capable of having medications relating to ophthalmology, such a suggestion is not proper. In fact, a detailed review of Mayfield and Whaley reveals that neither refers to the application of medications for the eye or ear, or in fact, hardly any medication that is not ingested, much less medications that would require direction as to their specific organ application -- either right or left or both. Moreover, neither Mayfield nor Whaley provide medical markings which indicate body parts or locations. As a result, the limitations of Claims 4 and 5 are sufficiently structural in view of the prior art, as well as different from the prior art, and these rejections should be reversed.

C. Claims 6, 16, 18 and 19 are improperly rejected under 35 U.S.C. 103(a) as unpatentable over Whaley in view of Rush and further in view of U.S. Patent No. 5,992,888 to North et al., and this rejection should be reversed.

The rejection of Claims 6, 16, 18 and 19 as obvious based upon the combination of Whaley as modified by Rush together with North is in error and should be reversed. As set forth above, the features of independent Claim 1 are erroneously stated as found in the recited combination of the Whaley and Rush references. The combination of North to the citation of

Whaley and Rush does not overcome this error with respect to dependent Claims 6, 16, 18 and 19.

The suggestion to combine references must not be derived by hindsight from knowledge of the invention itself. Interconnect Planning Corp. v. Feil, 774 F.2d 1132, 1143 (Fed. Cir. 1985) ("When prior art references require selective combination by the court to render obvious a subsequent invention, there must be some reason for the combination other than the hindsight gleaned from the invention itself.")

Claims 6, 16, 18 and 19 depend from Claim 1 and recite a medication reminder system having a color-coded sheet with rows which are completely color shaded, and with rows and columns forming a matrix. The rows and columns recite headers defining the rows, columns and fields, and include medical markings. Corresponding color coded medication containers are also recited. In Claim 6 the color coded sheet further includes advertising markings corresponding to the medications. In Claim 16 the color coded sheet includes coupons corresponding to the medications. In Claim 18 the color coded sheet contains an area for advertising markings. Claim 19 depends from Claim 18, and further recites the advertising markings as being for use at a pharmacy.

The use of advertising markings and coupons is erroneously suggested in the Final Office Action as failing to provide a structural difference between the claims and the prior art. However, the North reference fails to provide a suggestion to combine the advertising markings of the present invention within a medication reminder system. North teaches the use of an advertising format which is used in combination with a financial recording card, which is a card on which prior money transactions are listed. Specifically, the financial recording card is disclosed for use as a companion to a debit or credit card. While the North reference certainly discloses the use of third party advertising, the disclosure specifically calls out point of sale advertising events, and "that many data forms may be used in combination with the advertising format, provided the incentive for use is at least partly motivated by a transaction card which is typically carried in the wallet." (Col. 9, Lines 22-25.) No such point of sale or other financial transaction is contemplated for use with the color coded sheet and containers of the present reminder system. The use of the recited coupons or other advertising materials located on the color coded sheet of the present invention is unrelated to the recording of any financial

transaction or other sale event. Likewise, the reminder systems of Whaley and Mayfield fail to suggest such a combination, nor would it be obvious to make the combination, other than as a result of the hindsight provided by the present invention itself. The structural limitations recited in Claims 6, 16, 18 and 19 are sufficiently different from the prior art that the rejection should be reversed, and the claims allowed.

D. Claim 17 is improperly rejected under 35 U.S.C. 103(a) as unpatentable over Whaley in view of Rush and further in view of U.S. Patent No. 4,295,664 to Cutting, and this rejection should be reversed.

Claim 17 recites a medication reminder system where a tablet of multiple color coded sheets is provided, with each sheet having completely color shaded rows, and rows and columns forming a matrix. The rows and columns recite headers defining the rows, columns and fields, where the headers include medical markings, and corresponding color coded medication containers are also recited.

As previously discussed above, the combination of Whaley and Rush does not disclose or suggest the recited medication reminder system. It would not be obvious to one of ordinary skill in the art to combine the teachings of the Cutting reference with Whaley and Rush, and even if the combination were made, the recited invention does not result. Cutting discloses a medication record keeping system having transfer sheets for use in a hospital setting. The multiple sheets are used for recording what medications were administered by hospital personal. The cutting sheets do not provide reminder information regarding what medications to take or administer and how or when to take them. The Cutting reference is simply a system to record what medication was taken by a patient for their medical chart or records. It would not be obvious to one of ordinary skill to combine the record chart of Cutting with a medication reminder system. Even if combined, the result is not the invention recited in Claim 17, and this rejection should be reversed.

D. Conclusion

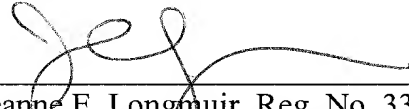
A review of the cited references indicates that teachings of certain of the recited features of the claimed invention are not disclosed by the Whaley and Rush references. Moreover, there is no motivation provided from the cited references for their combination, or for the further

combinations of Mayfield, North or Cutting. Applicant's invention in Claims 1-10 and 13-19 is not obvious and these improper rejections should be reversed.

Respectfully Submitted,

Date: _____

3/20/2007



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CLAIMS APPENDIX

The claims involved in this appeal are as follows:

1. (previously amended) A system for reminding patients or caregivers what medication to take or administer, how to take and administer the medication, and when to take or administer the medication comprising:
 - a color-coded sheet;
 - said sheet depicting one or more rows, wherein one or more of said rows are completely color shaded, and one or more columns, said rows and columns intersecting to form a matrix, said matrix comprising a plurality of fields;
 - said rows and columns further including headers, said headers defining parameters of said row or column and of said fields;
 - said headers including medical markings; and
 - one or more color coded medication containers.
2. (previously amended) The system of claim 1 wherein said rows are fully shaded in different colors.
3. (original) The system of claim 1 wherein said medical markings include indicators of medications.
4. (previously amended) The system of claim 3 wherein said medications relate to ophthalmology.
5. (original) The system of claim 4 wherein one of said markings designate which eye to place medication within.
6. (previously amended) The system of claim 3 wherein said color coded sheet further includes one or more advertising markings and one or more of said advertising markings correspond to one of said indicators of medications.
7. (original) The system of claim 1 wherein said color coded sheet further includes one or more areas for placing advertising markings.

8. (previously amended) The system of claim 1 wherein said markings include icons and at least one of said icons is a graphic representation of a time period within a day.
9. (original) The system of claim 1 wherein said markings include indicators of medication, where to administer said medication, when to administer said medication and comments on administering said medication.
10. (previously amended) A method of reminding a patient or caregiver when to take or administer medication comprising the steps of:
 - a) placing information upon color coded sheets having fully shaded color coded rows,
 - b) applying colored indicating devices to one or more containers of medication.
11. (canceled)
12. (canceled)
13. (previously amended) The system of claim 1 wherein said one or more color coded containers includes a color coded cap corresponding to the color of said completely color shaded row.
14. (previously amended) The system of claim 1 wherein each of said one or more completely color shaded rows includes a field in which a sticker depicting the color shade of that row may be placed.
15. (previously amended) The system of claim 14 further including a sticker within said field in each of said one or more rows.
16. (previously amended) The system of claim 3 further including one or more coupons within said color-coded sheet wherein one or more of said coupons correspond to one of said indicators of medication.
17. (previously amended) A system for reminding patients or caregivers what medication to take or administer, how to take and administer the medication, and when to take or administer the medication comprising:
 - a tablet of multiple sheets of color-coded paper;

each sheet depicting one or more rows wherein said rows are entirely color shaded and one or more columns, said rows and columns intersecting to form a matrix , said matrix comprising a plurality of fields;

said rows and columns further including headers, said headers defining parameters of said row or column and of said fields;

said headers including medical markings; and

one or more color coded medication containers.

18. (previously amended) The system of claim 3 wherein said color coded sheet further includes one or more areas for placing advertising markings.
19. (previously amended) The system of claim 3 wherein said color coded sheet further includes one or more advertising markings and one or more of said advertising markings correspond to a pharmacy where said sheet may be used.

EVIDENCE APPENDIX

NONE

RELATED PROCEEDINGS APPENDIX

NONE